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# DEFINING DOMESTIC VIOLENCE AND WOMEN'S AUTONOMY IN LAW

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*This paper explores the complex relationship between Indian feminism and the law and legal systems, as reflected in the recent (2015) Bombay High Court judgment on domestic violence. It is divided into two sections. The first section looks at feminist interventions in marital disputes and domestic violence through grassroots efforts, and outlines the multidimensional and hybrid feminist understandings of domestic violence, discusses change strategies and ethical principles that underpinned their action, and addresses the enactment of the Protection of Women from Domestic Violence Act, 2005 (PWDVA) as one such strategy against domestic violence. This section also focuses on feminist dilemmas and foregrounds the issue of women's autonomy in situations of domestic violence. The mainstreaming of feminist legal interventions through the PWDVA has brought new challenges for feminists and the second section discusses this issue by focusing on judicial intervention in deciding the boundary of counselling and mediation practices by protection officers under the PWDVA. We suggest that as seen in the 2015 judgement, while the judiciary has upheld some aspects of feminist practice and disallowed reconciliation in situations of serious physical domestic violence, its over-emphasis on equating physical violence with domestic violence and its protectionist stance has limited women's autonomy and gone against feminist counselling principles and politics undergirding feminist interventions in situations of domestic violence. We suggest that this judgment can be read as a dialogue within a section of feminist groups in India who endorse feminist political ideals of liberty, individual rights, and equality and seek to institutionalize these within the law. This paper is an*

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*analytical and interpretive piece and not an empirical inquiry into legal practice or a survey of case law developments of the PWDVA. It focuses on normative questions of theoretical and policy relevance arising from feminist engagements with law.*

## **I. INTRODUCTION**

The recent Bombay High Court (HC) judgment<sup>1</sup> on domestic violence brings to the fore the complex relationship between Indian feminism and the law and legal systems. Since the 1980s, feminists have engaged in multiple strategies on domestic violence—for example, outreach and support work for women experiencing domestic violence, which included counselling and refuge provision, legal aid, and campaigning on legal reforms.<sup>2</sup> This judgment can be read as a dialogue within a section of feminist groups in India who endorse feminist political ideals of liberty, individual rights, and equality and seek to institutionalize these within the PWDVA.

The judgment emerged from a petition by academic institutions, women's groups, and activists (Jaya Sagade and the Indian Law Society (ILS) Law College, Pune, Lawyers Collective, Majlis Legal Centre for Women, Tata Institute of Social Sciences, Bharatiya Stree Shakti and Stree Mukti Sanghatana) to make recommendations for the effective implementation of the PWDVA, including challenging the circular in Maharashtra that prohibited pre-litigation “joint counselling” of husband and wife in domestic violence cases without a court order. The judgment quashed this circular, and also directed that there should be no joint counselling/mediation in cases of “serious” physical domestic violence. These cases must be brought to the court for protection and relief prior to joint

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1 See, Dr. Jaya Sagade, Director v. The State of Maharashtra (In the High Court of Judicature at Bombay, Suo Motu Public Interest Litigation No. 104 of 2015/SOM.PIL.104/2015-DB).

2 Geetanjali Gangoli and Martin Rew, *Strategic Co-option Indian Feminists, the State and Legal Activism on Domestic Violence*, in UNDERSTANDING GENDER BASED VIOLENCE: NATIONAL AND INTERNATIONAL CONTEXTS, ROUTLEDGE STUDIES IN CRIME AND SOCIETY (2015); Gopika Solanki, *Beyond the Limitations of an Impasse: Feminism, Multiculturalism, and Legal Reforms in Religious Family Laws*, 40(1) POLITIKON: SOUTH AFRICAN JOURNAL OF POLITICAL STUDIES, 83–111 (2013); Gopika Solanki, *A Court of her own: Autonomy, Gender, and Women's Courts in India*, in GENDER EQUALITY AND JUSTICE IN FAMILY LAW DISPUTES: WOMEN, MEDIATION AND RELIGIOUS ARBITRATION, (B Samia and J Pierce, eds., forthcoming 2016).

counselling. In all other cases, the non-governmental organizations (NGOs), counsellors, or the police are directed that they may undertake counselling, including joint counselling/mediation, and that the “dispute” may be settled “amicably either by reconciliation or amicable separation.”

Before entering into these debates, we will provide a short summary of the domestic violence law and feminist interventions, challenges, and reflections on this issue. This paper is divided into two sections. The first section begins with the background of feminist interventions in marital disputes and domestic violence through grassroots efforts. This section outlines the multidimensional understanding of domestic violence that feminists arrived at through their work, discusses change in strategies and ethical principles that underpinned their action. This section also focuses on feminist dilemmas and foregrounds the issue of women's autonomy in situations of domestic violence as one such instance. The section explains why autonomous feminist groups privileged women's autonomy in countering domestic violence while recognising that structural inequalities could inhibit the exercise of freedom. The feminists also attempted to address domestic violence through collective action from bottom up and the enactment of the PWDVA is one such strategy. The PWDVA is one of the feminist attempts to institutionalise their indigenously evolved counselling principles and mediation practices as part of their intervention in redressal of domestic violence. The mainstreaming of feminist legal interventions through the PWDVA has brought new challenges for feminists and the second section discusses this issue by focusing on judicial intervention in deciding the boundary of counselling and mediation practices by protection officers under the PWDVA. We suggest that while the judiciary has upheld some aspects of feminist practice and disallowed reconciliation in situations of serious physical domestic violence, its over-emphasis on equating physical violence with domestic violence and its protectionist stance has limited women's autonomy and gone against feminist counselling principles and politics undergirding feminist interventions in situations of domestic violence.

In terms of methods, this paper is an analytical and interpretive piece and not an empirical inquiry into legal practice or a survey of case law developments of the PWDVA. This paper is also not meant to be an example of evidence-based and positivist law-making through adjudication. It focuses on normative questions of theoretical and policy relevance arising from feminist engagements with law.

## II. THE BACKDROP: WOMEN'S MOVEMENTS IN INDIA

Internationally, women's issues gained global prominence with the declaration of the period 1975–1985 as the United Nations Decade for Women. In India, the State responded by commissioning a report on the status of women to a group of feminist researchers and activists, which acknowledged that women in India suffered from a range of structural inequalities and injustices.<sup>3</sup> This was the period when the “autonomous” women's movement in India properly emerged, where some groups and certain individuals decided to leave left wing political parties and signify their autonomy from the State, both of which were patriarchal and restrictive in their view.<sup>4</sup> Feminist groups worked closely with other social movements working against poverty, corruption, caste, and class, but unlike in the West,<sup>5</sup> in India there has been no serious discussion of a feminist separatist State.<sup>6</sup> The nascent feminist groups emerging in the late 1970s and early 1980s focused primarily on the issues of police and State-initiated violence against women. The first major campaign of the women's movement was to protest against the role of the judiciary in condoning the rape of a tribal girl, Mathura, by a group of policemen in a police station in 1978. As a feminist activist reflected, “[we] were interested in issues of class, but we were clearly distinct from left-wing party organizations. For us, we saw that patriarchy would still exist in a socialist State, while for left-wing party women's activists...they thought we should wait for the [socialist] revolution until patriarchy could be tackled.”<sup>7</sup> Indeed, the groups themselves had a distinct class base. For example, in the early 1980s, members of the feminist group Forum

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3 Phulrenu Guha, *et al*, *Towards Equality*, Report of the Committee on the Status of Women in India, Government of India, New Delhi (1974); Shirin Rai and Shraddha Chigateri, *Emerging State Feminism in India: A Conversation with Vina Mazumdar*, Member Secretary to the First Committee on the Status of Women in India, 9(1) INTERNATIONAL FEMINIST JOURNAL OF POLITICS, 104–111 (2007).

4 Vijay Agnew, *The West in Feminist Debate: Discourse and Practice*, 20(1) WOMEN'S STUDIES INTERNATIONAL JOURNAL, 3–19 (1997).

5 Catharine A. MacKinnon, *TOWARD A FEMINIST THEORY OF THE STATE* (1989).

6 We refer here to debates such as those put forward by authors such as Roxanne Dunbar-Ortiz who have argued for and through the radical feminist group Cell 16, advising women to separate from those men who were not actively working towards the emancipation of women from patriarchal power.

7 Considering field note entries and discussions with three feminist movement activists in Mumbai in November 2001.

Against Rape (later called Forum Against Oppression of Women ("FAOW")) identified themselves as an ad-hoc body, predominantly made up of women who had "cosmopolitan values, and were well informed about Western liberation movements."<sup>8</sup> While the FAOW began primarily as a movement to publicise and fight against sexual violence against women, FAOW as a group has also since campaigned on issues ranging from the rights of sexual minorities to domestic and sexual violence.

Equally, Indian feminists were also challenged by feminists from minority communities, who suggested that "mainstream" feminism was upper-caste Hindu in its orientation, and that it did not address the issues of minority women.<sup>9</sup> This led to the formation of organizations such as Awaaz-e-Niswaan (Voice of Women) formed in Mumbai in 1987 in a predominantly Muslim-dominated area.<sup>10</sup> Current feminist activism in India has also adopted the Internet as a key forum, including online campaigns against sexual harassment, such as The Blank Noise Project,<sup>11</sup> and the Pink Chaddi Campaign (or Pink Underwear Campaign) that grew from a Facebook website protesting against fundamentalist control over women, and feminist e-groups such as Feminists India. The Indian feminist movement, therefore, is a hybrid and uses a range of tactics to address different forms of violence against women.

### **III. FEMINIST INTERVENTIONS AND QUESTIONS SURROUNDING DOMESTIC VIOLENCE AND FEMINIST COUNSELLING**

The Indian women's movements (consisting of autonomous feminist collectives, agitational groups, grassroots organizations, political fronts of parties, women's wings of trade unions, counselling centres, and NGOs in

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8 Vibhuti, Sujata, and Padma, *The Anti Rape Movement in India* in *THIRD WORLD, SECOND SEX: WOMEN'S STRUGGLES AND NATIONAL LIBERATION*, 180–190 (M. Davis, ed., 1983).

9 *Moving...But Not Quite There—Evaluation Report of One Decade 1980–1990*, FORUM AGAINST OPPRESSION OF WOMEN, BOMBAY (1990); Kumkum Sangari, *Politics of Diversity: Religious Communities and Multiple Patriarchies*, 30(51) *ECONOMIC AND POLITICAL WEEKLY*, 3787–3810 (1995).

10 Nivedita Menon, *RECOVERING SUBVERSION: FEMINIST POLITICS BEYOND THE LAW* (2004).

11 Trishima Mitra-Kahn, *Offline Issues, Online Lives? The Emerging Cyberlife of Feminist Politics in Urban India*, in *SOUTH ASIAN FEMINISMS: POLITICS AND POSSIBILITIES* (Srila Roy, ed., 2013).

Mumbai) emerged in the 1970s and spread to urban and rural areas.<sup>12</sup> Arguing that women's movements in India are embedded in political environments of Indian federalism, Raka Ray pointed out that women's groups in Calcutta were more likely to be embedded in the political culture of the Communist Party of India (Marxist) that ruled the State and exercised considerable ideological influence.<sup>13</sup> These groups therefore organized around issues such as women's literacy, discrimination in wage employment, access to public resources, and addressing the "practical interests" of women, arising from concrete conditions of material and ideational realities of women.<sup>14</sup> On the other hand, embedded in a politically heterogeneous political environment of Mumbai and exposed to multiple ideological and material influences, women's groups in Mumbai were more likely to organize around issues affecting women's "strategic interests," rooted in gender subordination and entailing strategic goal of emancipation of women from gender and other hierarchies,<sup>15</sup> taking up issues of violence against women, female foeticide, religious fundamentalism, and sexual harassment at the workplace.<sup>16</sup> Legal reforms and everyday engagements with the law have been a focus of women's groups in Mumbai,<sup>17</sup> and feminist groups have built a formal and informal network of contacts with the police, the courts (especially the Family Court), and social welfare departments, in addition to academic institutions, journalists, lawyers, filmmakers, and other human rights and legal organizations and communist parties. As a result, there is a constant exchange of ideas across these networks.<sup>18</sup>

The issue of violence against women—especially domestic violence—remains an enduring concern for the women's movements in Mumbai. The women's groups in Mumbai responded to this issue by establishing collective and grassroots organizations that provided feminist counselling and mediation, and established feminist shelters. For instance,

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12 Geetanjali Gangoli, *INDIAN FEMINISMS: LAW, PATRIARCHY AND VIOLENCE IN INDIA* (2007).

13 Raka Ray, *FIELDS OF PROTEST: WOMEN'S MOVEMENTS IN INDIA* (1999).

14 Maxine Molyneux, *Mobilization without Emancipation? Women's interests, the State, and Revolution in Nicaragua*, 11(2) *FEMINIST STUDIES*, 227–254 (1985).

15 *Id.*

16 Raka Ray, *supra* note 13.

17 Gangoli 2007, *supra* note 12.

18 Gopika Solanki, *ADJUDICATION IN RELIGIOUS FAMILY LAWS: CULTURAL ACCOMMODATION, LEGAL PLURALISM, AND GENDER EQUALITY IN INDIA* (2011).



groups such as the Forum Against Oppression of Women formed a feminist crisis and counselling centre in 1981, called the Women's Centre, as did groups such as the Stree Mukti Sanghatana, Swadhar and later, the Awaaz-e-Niswaan. They have also experimented in developing organizational models that can address the issue of violence against women. For instance, feminists from academic institution such as the Tata Institute of Social Sciences (TISS) and the Mumbai police created Special Cells for Women and Children in selected police stations in Mumbai in order to respond to the needs and interests of women who approach the police for help in cases of violence against women.<sup>19</sup> These experiments have been institutionalized in the PWDVA.<sup>20</sup>

This paper is based on this section of the Indian feminist movements' ideological preconceptions, beliefs, and assumptions regarding the feminist practice of intervention in family disputes that are underlined by key concerns within liberalism such as rights, justice, equality, and autonomy. This section of feminists who were part of autonomous women's groups since 1970s have held these concepts as central to feminist counselling and integrated them into feminist practice. This is not to discount the fact that these views may not be shared across Indian feminist movements and there are feminist groups whose practice may not mirror these liberal values. This paper however is limited to the discussion of this case in the light of feminist debates within secular and humanist organizations.

#### **IV. DOMESTIC VIOLENCE, FEMINIST DILEMMAS, AND REFLECTIONS**

Since their early days, these feminist organizations confronted these two core questions: What should the nature of feminist intervention be in cases of domestic violence? What kind of political and ethical principles might undergird this form of intervention? The feminist groups, through their grassroots-level work, activism, and experiences of legal campaigns have arrived at a political understanding of domestic violence and have developed ethical principles that govern their intervention in cases of domestic violence against women. For instance, these organizations, through their praxis, see domestic violence as a continuum between mental and physical violence. Second, women's groups see a link between episodic violence that women experience with routine violence

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19 Anjali Dave and Gopika Solanki, *Journey from Violence to Crime: a Study of Domestic Violence in the City of Mumbai*, TATA INSTITUTE OF SOCIAL SCIENCES, MUMBAI (2001).

20 Solanki 2013, *supra* note 2.



embedded in the structure of marriage and material and other inequalities. Furthermore, while laws addressing domestic violence focused on marital violence, these groups along with other women's movements sought to address the issue of violence against single women alongside violence in intimate relations; they were also the first groups to address violence against lesbians and transgender persons.<sup>21</sup> In addition, their intervention is local and contextual. Indian feminist centres offer a variety of services, ranging from counselling to arbitration, mediation, and adjudication in religious family laws. They also provide emotional support to women; build counter-hegemonic spaces; enable women to join legal and other feminist campaigns; help them access shelter, medical services, and legal aid; intervene with their immediate and extended families, neighbourhoods, caste and sect councils, community leaders, and members (including religious organizations and groups); and often arrange for employment and other support through informal networks.<sup>22</sup>

These women's groups have also developed certain ethical principles around feminist counselling, which came from their own experiences of addressing domestic and sexual violence against women. For instance, they believe that domestic violence is a product of structural inequality against women, and this power imbalance carries over into counselling; therefore, they advocate a pro-woman approach in their work. This does not make them susceptible to their political certitudes but enables them to offer counselling that listens to all sides yet addresses the question of gender hierarchy in and through their counselling.<sup>23</sup> The first step in their counselling practice is to believe the woman and believe in the woman; in other words, they begin with the premise that women are able to make autonomous choices and that their task is to facilitate this process.<sup>24</sup>

Feminists groups recognized since the 1980s that women who approached them for help faced both material and legal constraints that left few options of exit for women. For instance, women across ethnicity, caste, religion, and class faced specific legal constraints in postcolonial India, and many of these continue to persist in the contemporary laws and legal system. The feminists found that maintenance amounts granted to women were low and difficult to obtain despite

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21 Solanki 2013, *supra* note 2.

22 Solanki 2011, *supra* note 18; Solanki forthcoming, *supra* note 2.

23 Solanki forthcoming, *supra* note 2.

24 Solanki forthcoming, *supra* note 2.

court orders. The legal battle was lengthy, cumbersome, and expensive for most women. Many women were unable to support their children economically but were the primary caregivers who were concerned about their children's safety, well-being, and care. In addition, women who complained of violence were thrown out of homes and thus faced a problem of shelter; also, during negotiations, gender-based economic inequality, unequal inheritance rights, and lack of employment opportunities skewed the power in favour of men.<sup>25</sup>

Minority women were also at risk from religious fundamentalism and communal violence.<sup>26</sup> Single women faced the loss of social status and were especially vulnerable to sexual harassment from family members and neighbours as well as from other men, as they were perceived to be without the protection of a man. These constraints needed to be featured into feminist negotiations, bargaining, and interventions while working on individual cases. In addition, feminists also realized that ideological beliefs in the sanctity of marriage and social recognition of marriage were also internalized by some women and played a role in many women's decisions to reconcile with their husbands and families.

Feminist philosophers have debated this issue and have used Isaiah Berlin's account of two concepts of liberty as central to their discourse. In his famous essay, "Two Conceptions of Liberty," Berlin articulates the concepts of "negative" and "positive" liberty.<sup>27</sup> For Berlin, negative liberty is linked to an absence of external constraints such as law, physical force, and coercion from external sources. In this conception, the subject recognizes her desires that are seen as coming out of an internal process, but is unable to pursue them due to external circumstances and thus establishes a distinction between external constraints and internal subjectivity. The concept of positive liberty, on the other hand, focuses on internal barriers (such as addictions, fears, immediate desires) that can be qualitatively evaluated, and that can limit freedom and the ability to realize our self-authored projects. Feminists have pointed out that freedom is denied to women, minorities, and to the poor and more vulnerable populations whose lives are structured by external constraints.<sup>28</sup> However, the theoretical approach of positive liberty represents yet another difficulty for

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25 Solanki forthcoming, *supra* note 2.

26 Solanki 2011, *supra* note 18.

27 Isaiah Berlin, *FOUR ESSAYS ON LIBERTY* (1971).

28 Diana Coole, *WOMEN IN POLITICAL THEORY: FROM ANCIENT MISOGYNY TO CONTEMPORARY FEMINISM* (1993).

women. Given that patriarchy is socially constructed and is embedded in language, conceptual and epistemological categories that enable us to make sense of the world—and in social rules, customs, and laws that restrict women's choices and freedoms—women's lives have also become constituted by their subservience to men and the denial of their humanity. Using this discussion to illustrate the question of why women might choose to go back to families where they face violence, feminist philosopher Nancy Hirschmann suggested the need for a feminist conception of freedom that expands the conception of negative liberty by adding a realistic account of gendered and other intersectional constraints that women face and by creating imaginative possibilities for the exercise of positive liberty through collective feminist action.<sup>29</sup>

Over the years, therefore, feminist scholars have engaged with these dilemmas at several levels. Some have criticized these ideas as masculinist conceptions that are rooted in individualistic conceptions of self-governing individuals;<sup>30</sup> others have stressed that the removal of negative barriers is a necessary condition to visualize feminist freedom,<sup>31</sup> and yet others have argued to decouple notions of feminist agency from the emancipatory potential of conceptions of freedom.<sup>32</sup> Other feminist philosophers have developed notions of feminist freedom that place centrality in notions of choice and agency, but deeply anchor agency in material and ideological contexts and relationships.<sup>33</sup> Additionally, they place a great emphasis on collective action as a means to politically and epistemologically challenge patriarchy and provide the new means to change and rebuild lives and communities of women.<sup>34</sup>

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29 Nancy Hirschmann, *Domestic Violence and the Theoretical Discourse of Freedom*, 16(1) JOURNAL OF WOMEN'S STUDIES, 126–151 (1996).

30 Carol Gilligan, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

31 Marina Oshana, PERSONAL AUTONOMY IN SOCIETY (2006).

32 Saba Mahmood, POLITICS OF PIETY: THE ISLAMIC REVIVAL AND THE FEMINIST SUBJECT (2005).

33 Jennifer Nedelsky, LAW'S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY AND LAW (2011).

34 Patricia Hill Collins, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS AND THE POLITICS OF EMPOWERMENT (1990); Nancy Harstock, MONEY, SEX, AND POWER: TOWARDS A FEMINIST HISTORICAL MATERIALISM (1985).

Often a distinction is made between “serious” physical violence and other forms of abuse. Following Stark,<sup>35</sup> we postulate that such a distinction is not only erroneous but is actually dangerous. Stark had critiqued the way in which domestic violence is conceptualized in US law essentially as being episodic and incident based, rather than address the patterns of power and control or what he terms “coercive control.” Stark points out that while the domestic violence model focuses on intermittent acts of physical violence against women, it has failed to reduce assaults and homicides because it does not address the systemic causes of violence, or the structural roots of women’s vulnerability:<sup>36</sup>

The domestic violence revolution is stalled and the interventions it has spawned are largely ineffective because it has failed to come to grips with coercive control, a pattern of liberty harms that is several orders of magnitude more devastating than the traditional forms of domestic violence current laws, policies, and programs are designed to manage.

A more recent body of literature has moved away from a narrow definition of agency and opened it up to ethical action and decisions that may not be considered agentic at first glance; it has considered the relationship between agency and freedom, arguing that while material, ideological, and discursive conditions can be determining, socially enacted agentic possibilities are always possible.<sup>37</sup>

## **V. RESPONDING TO THESE QUESTIONS: FEMINIST INTERVENTIONS, ACTIONS, AND CHALLENGES**

Autonomous feminist collectives and groups in Mumbai and elsewhere in India debated issues around agency and intervention intensely in the 1980s and arrived at certain political understandings that shaped their feminist principles of intervention in marital disputes and violence within the family. Indeed, these journeys of individual women and feminist organizations in Mumbai have been

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35 Evan Stark, *COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE* (2007).

36 *Id.* at 397.

37 Carisa Showden, *CHOICES WOMEN MAKE: AGENCY IN DOMESTIC VIOLENCE, ASSISTED REPRODUCTION, AND SEX WORK* (2011).

effectively documented.<sup>38</sup> These feminist organizations privileged a liberal approach to autonomy and saw their intervention stemming from the centrality of liberal conceptions of autonomy, freedom, and equality. They developed a nuanced understanding of domestic violence through praxis. For instance, feminists did not see women's choices to return to situations of domestic violence as a sign of individual pathology, but as a result of material contexts and social meanings of marriage. They also learned not to categorize a woman's actions when faced with domestic violence into a logic of all or nothing. Indeed, they acknowledged that a woman's decision to approach women's organizations when faced with violence was, in itself, an act of autonomy and ought to be respected as such. Feminist activists learned that the first step in feminist intervention was to listen to women and be their interlocutors as they developed options for women. Second, feminist groups aimed to provide women-centred spaces, thus creating an environment and support that enhanced women's capacity to reflect and arrive at decisions about their lives; they aimed to increase their normative competence,<sup>39</sup> by challenging patriarchal assumptions about marriage and family during counselling by providing access to possibilities of imagining lives without violence.<sup>40</sup> However, after much debate, feminists also recognized that women may not always choose options that align with ideas and goals of feminist organizations. Women's groups resisted the idea that this was a sign of women's false consciousness or that women were dupes of patriarchy. However, they recognized that women often make decisions to go back to the home where they faced violence. They also recognized, that women may go back and forth, and that women on average may go through numerous attempts at reconciliation before making up their minds. Indeed, Mumbai feminist groups in the 1980s arrived at a conclusion—not without moral and political apprehensions—that they recognized women faced enormous material and ideological constraints when confronted with domestic violence. In the face of these constraints, individual women may choose to go back to their families and that the feminist groups would respect the agency of women to take these

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38 Flavia Agnes, *MY STORY...OUR STORY: OF REBUILDING BROKEN LIVES* (1984); Nandita Gandhi and Nandita Shah, *The Issues at Stake: Theory and Practice in the Contemporary Women's Movement in India*, KALI FOR WOMEN, NEW DELHI (1992); Gangoli 2007, *supra* note 12; Solanki forthcoming, *supra* note 2.

39 Paul Benson, *Autonomy and Oppressive Socialization*, 17(3) SOCIAL THEORY AND PRACTICE, 385–408 (1991).

40 Solanki forthcoming, *supra* note 2.

decisions. Feminists recognized that such decisions could negatively affect women's lives. However, they also recognized that to make choices for women—and to impose feminist choices on women—would be paternalistic, an admission that women were mere instruments of patriarchy, incapable of taking control of their lives, and that such a conclusion would be antithetical to feminist political, ethical, and epistemological goals, understanding, and action.

These insights and dilemmas raised an immediate question regarding intervention: What should the nature of feminist intervention be under such circumstances? As an answer to this question, feminist organizations opted to increase women's bargaining power every time they effected reconciliation, and have devised multiple redressal strategies over time.<sup>41</sup> For instance, women's groups follow certain procedures when a woman decides to go back to a family context that is violent. They go over the dangers of such a decision with women: they remind them that violence may continue, that their step of reporting of violence can, at times, lead to more retaliatory violence if they go back, and that this option may be a dangerous one for them. Should women still persist in making these choices, feminist groups once again remind women of legal options, ask them to lodge a complaint at the nearby police station, and to call them every time there is an episode of violence. The feminist groups also put them in touch with local women in the neighbourhood or local organizations that may be of help when faced with violence; the groups often hold meetings with neighbours and urge them to intervene, and they reassure women that the doors of their organizations are always open to them anytime.<sup>42</sup> Indeed, these women's organizations placed some of these strategies before the Bombay HC when they argued that these groups should draft a written agreement between the two parties of domestic violence to require men to guarantee that they will not violate the women again if they choose to go back to their marital family; these documents have evidentiary use. Indeed, these feminist strategies (which were first developed in feminist collectives and autonomous organizations) spread to women's courts and NGOs, community groups,<sup>43</sup> and to women's

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41 Solanki 2011, *supra* note 18.

42 Solanki forthcoming, *supra* note 2.

43 Anuradha Rajan and Nandita Bhatla, *Private Concerns in Public Discourse*, 38(17) ECONOMIC AND POLITICAL WEEKLY, 1658–1664 (2003).

programs such as the Mahila Samakhya (education for women's equality).<sup>44</sup>

Second, feminists realized that when faced with violence, women may make choices that go against their advice, experience, and political leanings. However, privileging women's autonomy remained critical to their interventions and this remained woven into their interventions. For instance, during their counselling, the organization would always guarantee that their doors would be open to any woman at any time and at any point, and this included women who appeared to act against expert advice and experience of these organizations. They would stress in their interventions, time and again, that women had the choice of terminating their relationship with the feminist group and/or picking it up at any time. Various feminist organizations and groups also realized that women, when faced with marital disputes and violence, often talked to every organization and individual that they felt might be able to help. Feminist groups, however, saw a woman forum-shopping among various organizations as her right, even if these groups were stretched for resources and time.

Working in individual cases and building organizations and programs has been one aspect of the Indian Women's Movements' intervention in domestic violence—their aim has been to expand the possibility of freedom from domestic violence through collective action.<sup>45</sup> Indeed, this petition by the women's groups and human rights organization in the Bombay HC is evidence of ongoing feminist attempts at interventions in law. From the 1980s, Indian women's movements have consistently engaged with legal reforms and with institutions in state and society to make justice accessible for women. They lobbied for more family courts, women's police stations, and women's policy machinery; built alliances with the police and the judiciary; devised programs to diffuse and communicate feminist ideas and experiences; and often monitored police and judicial inaction in matters related to family law.<sup>46</sup> Feminists also experimented with creating alternative institutional structures—for instance, the feminist social workers in Bombay (based at TISS, an academic institution), established the Special Cell for Women and Children, an institutional hybrid that housed this feminist organization within the Bombay police, thereby drawing on

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44 Sushma Iyengar, *A Study of Nari Adalats and Women's Courts in Gujarat* (2007) (Unpublished UNDP Report) available at <http://asia-pacific.undp.org/practices/governance/a2j/docs/CaseStudy-05-India-NariAdalat.pdf> (Last visited 23 May 2012).

45 Solanki 2011, *supra* note 18.

46 Solanki 2013, *supra* note 2.



the police's resources while retaining autonomy by locating itself within the interstices of a university to address cases of violence against women. This experiment also provided the ideal model for developing the administrative infrastructure envisaged under the new PWDVA.

The experience of feminist hybrid intervention in cases of domestic violence has also been scaled up through its institutionalization by state governments' educational program such as the women's courts in the Mahila Samakhya Programme in Gujarat,<sup>47</sup> and in women's courts run by the NGOs. This notion of women's failure to live up to liberal expectations of challenging domestic violence by walking out on marriage and seemingly submitting to family ideology is echoed in some accounts. In addition, similar accounts of women's organizations' intervention in handling cases of marital disputes and domestic violence have been understood as "bargaining with patriarchy," such accounts fail to connect the interrelationship between feminist collective action and individual interventions.<sup>48</sup> In contrast, women's groups have seen their activism beyond this framework and see their work as ultimately transformative.<sup>49</sup>

## **VI. CARRYING THESE DEBATES IN LAW**

The previous section sketched feminist autonomous groups' interventions in addressing domestic violence. Various aspects of feminist policy goals have been mainstreamed into the PWDVA. Opinions within feminist groups and the state vary over the effectiveness of this feminist transplantation of small scale feminist counselling and mediation practices into the state-led implementation of the PWDVA. Recently, the Bombay HC intervened in this debate and this section of the paper captures these developments. We believe this judgment raises very valid issues of women's

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47 Iyengar, *supra* note 44; Gopika Solanki, *A Fine Balance? Multilevel Governance and Women's Organising in India*, in *FEDERALISM, FEMINISM AND MULTILEVEL GOVERNANCE* (M Haussman, *et al*, eds., 2010).

48 Shalini Grover, *MARRIAGE, LOVE, CASTE, AND KINSHIP SUPPORT: LIVED EXPERIENCES OF THE URBAN POOR IN INDIA* (2011); Katherine Lemons, *At the Margins of Law: Adjudicating Muslim Families in Contemporary Delhi* (2010) (Unpublished PhD dissertation, University of California Press, Berkeley).

49 Gangoli 2007, *supra* note 12; Solanki 2011, *supra* note 18; Solanki forthcoming, *supra* note 2.

autonomy in experiences of domestic violence and abuse, and the vexed question of who may provide feminist counselling and/or mediation. We are concerned about the primacy given to “serious” physical violence, raised by the judgment, and explore these issues in the light of debates covered in section one.

### Domestic Violence Law

The PWDVA was a direct consequence of feminist intervention and engagement, and the role of women’s organizations in drafting the Act has been noted.<sup>50</sup> The Lawyers Collective claims the 2005 bill as being a “landmark victory,” and its website points to its close working relationship with the State:<sup>51</sup>

Following the inclusion of the domestic violence bill as a priority...we were invited to a series of discussions on the proposed bill with the Secretary and members of the Department of Women and Child....The introduction of the Bill in the Parliament was preceded by presentations made by Lawyers Collective Women’s Right Initiative (LCWRI) along with several prominent women’s groups and a full-fledged campaign to create awareness on the need for this law. The campaign...was started in 1998 by LCWRI with several women’s groups from across the country.

While India had criminalized domestic violence against married women as mental and physical “cruelty” as early as 1983, women’s groups were rightly concerned that this had not benefitted women due to its focus on physical, rather than mental, violence; and its bias towards dowry-related murders and violence in implementation. The low conviction rate exacerbated this issue.<sup>52</sup> The PWDVA had a broad definition of domestic violence, which included all types of family relationships (such as domestic violence against men, and

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50 Audrey D’Mello and Flavia Agnes, *Protection of Women from Domestic Violence*, 50(44) ECONOMIC AND POLITICAL WEEKLY, 76–84 (2015); Gangoli and Rew, *supra* note 2; Solanki 2013, *supra* note 2.

51 Lawyers Collective, *Domestic Violence* (2011), available at <http://www.lawyerscollective.org/domestic-violence/domestic-violence.html> (Last visited 3 December 2011).

52 Flavia Agnes, *Protecting Women Against Violence? Review of a Decade of Legislation 1980–89*, 27(1) ECONOMIC AND POLITICAL WEEKLY, 19–33 (1992).

between women), and extended to women and men in “live-in relationships.” It also included in its scope sexual violence, enabling married women some relief in cases of marital rape (although marital rape continues to not be recognized as a criminal offence under the Indian Penal Code). The PWDVA moved away from criminalization and included civil protection for women in violent relationships, including the right to matrimonial property, and provided for injunctions.

The PWDVA was also based on what has been termed a “convergent model”<sup>53</sup> between a Protection Officer (PO), a new post, who would help women approach the courts and other services. Much of these emerged from indigenous feminist models, such as the Special Cell for Women.<sup>54</sup>

The salient features of the PWDVA are as follows:

- The Act seeks to cover those women who are or have been in a relationship with the abuser where both parties have lived together in a shared household and are related by consanguinity, marriage or a relationship in the nature of marriage, or adoption; in addition, relationship with family members living together as a joint family are also included. Even those women who are sisters, widows, mothers, single women, or living with them are entitled to get legal protection under the proposed Act.
- “Domestic violence” includes actual abuse or the threat of abuse that is physical, sexual, verbal, emotional, and economic. This includes dowry-related violence.
- The Act secures a married woman’s right to secure housing in cases of domestic violence. The Act provides for the woman’s right to reside in the matrimonial or shared household, whether or not she has any title or rights in the household. This right is secured by a residence order, which is passed by a court.
- The Act empowers the court to pass protection orders that prevent the abuser from aiding or committing an act of domestic violence or any other specified act, entering a workplace or any other place frequented by the abused, attempting to communicate with the abused, isolating any assets used by both the parties, and causing violence to the abused, her

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53 Agnes and D’Mello, *supra* note 50.

relatives, and others who provide her assistance from the domestic violence.

- The Act provides for appointment of POs and NGOs to provide assistance to the woman with regard to medical examination, legal aid, safe shelter, and so forth.
- The Act provides for breach of protection order or interim protection order by the respondent as a cognizable and non-bailable offence punishable with imprisonment for a term which may extend to one year, or with a fine that may extend to twenty thousand rupees, or with both. Similarly, non-compliance or discharge of duties by the PO is also sought to be made an offence under the Act with similar punishment.

There have been concerns that the PWDVA, while excellent in its formulation, faced many problems of implementation and interpretation. In a judgment in 2007,<sup>55</sup> it was stated that there was no evidence that the respondent was suffering domestic violence, because the respondent had left her marital home and was perceived as not behaving in a traditional manner towards her husband and his extended family. In this case, judicial views often reflected popular gender perceptions, which may support Menon's assertion that feminist engagement with the law cannot fundamentally change the legal understanding of how the category "woman" is constructed in law.<sup>56</sup> Further, there were valid concerns raised by women's groups that there were gaps in support services for women experiencing domestic violence. Research done by the authors,<sup>57</sup> indicates the lack of refuge provision specifically meeting the needs of women experiencing or escaping domestic violence, and the solution by state governments has been to offer "counselling" and/or mediation by a number of state and non-state actors. As stated in the first section of the paper, we have found that feminist NGOs offer a qualitatively different form of counselling, based more on women's agency than, for example, the police or community-based organizations, which may veer more towards mediation or reconciliation. Here, it is important to note that the terms counselling and mediation are seen as

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55 Sonia v. Vinod (In the court of Dr. Shahabuddin: MM Rohini: Delhi, Applicant No. 1192, 2007).

56 Nivedita, *supra* note 10.

57 Gangoli 2007, *supra* note 12.

synonymous in the 2015 judgment, yet they may have very different meanings in practice.

The feminist model of counselling and intervention is institutionalized in the PWDVA. However, its critics point out that although the feminist model continues to be effective, it has failed once it was institutionalized within the state through the PWDVA and scaled up. It is suggested that counsellors coerce women into reconciling with violent partners and husbands (even in cases of extreme violence) and the law works to reinforce patriarchy and violence; and has failed as a tool to protect and empower women.<sup>58</sup>

These debates have been revived in a recent case in Bombay HC, and this section discusses the same. Following this worldview that pre-litigation counselling by service providers under the PWDVA harms women's interests and persuades them to reconcile despite violence, the Department of Women and Child Development, Maharashtra state issued a circular titled AG/312/2014 on 24 July, 2014, with regard to counselling/mediation under the PWDVA. The circular circumscribed and limited the ambit of protection agencies: it states that such agencies are only allowed to inform the aggrieved woman of her rights, to help her access medical services and shelter homes, and to enable her to file a case as an independent litigant or through a PO. Furthermore, the circular directed the outside agencies to carry out counselling or mediation only after the case is filed in the court and after the court directs these agencies to perform these tasks.

This circular was challenged by a Public Interest Litigation filed by Dr. Jaya Sagade of the Women's Studies Centre, ILS, Pune, and other co-petitioners (including TISS, the Bharatiya Stree Shakti, the Stree Mukti Sanghatana, Majlis Manch, and the Lawyers Collective) who placed their experiences of working as protection agencies before the court. They argued that the circular violated Articles 14 and 21 of the Constitution, being arbitrary and discriminatory in nature. The co-petitioners argued that the opposite conditions prevailed when it came to the implementation of this Act on the ground. They suggested that while the Act explicitly provides for counselling services for preventing violence against women using feminist counselling; in practice, once filed, cases were referred to mediation judges for mediation, and counsellors' services were

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58 Flavia Agnes and Audrey D'Mello, *Protection of Women from Domestic Violence*, 50(44) ECONOMIC & POLITICAL WEEKLY 76 (2015).

underutilized. Therefore, the issue before the Bombay HC in this matter was whether pre-litigation counselling was within the legal ambit of the PWDVA. The law cannot limit a woman's freedom in terms of who and when she can approach for any type of counselling and/or mediation. Further, in our opinion, this circular was aiming to swallow the autonomy of the very organizations that brought the legislation into existence in the first place.

## **VII. SUMMARY OF THE JUDGMENT**

The following three questions were addressed by the Court: Do service providers have the power to provide counselling or is their role limited to giving information to applicants who approach them and direct them to other services? Does pre-litigation counselling fall within the scope of the PWDVA? Should any form of counselling commence only after a case has been filed in the court?

In light of these questions, the Court held that counsellors are legitimate actors within the ambit of the Act, and to limit the remit of their authority would be to restrict the scope of the Act. The judge stated that the PWDVA mandates pre-litigation counselling. The court opined that a circular that limits feminist counselling to information exchange or referral service, reduces pre-litigation intervention to a clerical exercise. This circular also exposes women to the vagaries of litigation, harms women's interests by denying them access to pre-litigation counselling (when they need it the most), does not fit into the spirit of the Act (which aims to protect and empower women), and is not consistent with the Convention on the Elimination of Discrimination against Women (CEDAW). The judge acknowledged that there are various informal counselling forums in society, and that they would not fall within the purview of the court order. However, to deny women access to counselling when they are reporting violence might adversely affect their interests and be discriminatory compared to other women who do not face violence, yet can access counselling in face of matrimonial dispute. The Court reiterated that each woman who faces violence should have access to pre-litigation counselling, and that there is no breach of the PWDVA if a woman is counselled about her options.

The Court acknowledged the position of the Maharashtra state that pre-litigation counselling may be lengthy and may not achieve the desired outcome. The lapse of time before negotiations in such cases would adversely affect women's interests and, therefore, rules might be framed so that as soon as a

woman files an application under Section 10 of the Act, the magistrate should pass an interim and pre-interim order that addresses her immediate needs (such as maintenance, custody, and residence). However, the magistrate also recognized that there is nothing in the Act that suggests the order would only be in the favour of the woman; therefore, the magistrate recognized that the circular violated the spirit of the PWDVA.

The Court recognized the state's concern that women are often faced to compromise in police stations when they wish to file criminal cases under Section 498A of the Indian Penal Code; similarly, the Court acknowledged that counsellors can also persuade women to reconcile, and reiterated that women's choices must be foregrounded in any joint counselling sessions and that women should not be advised to reconcile against their wish. While the Court acknowledged that the police do not refer clients to POs under the PWDVA and that they coerce women into reconciliation, it also suggested that bad practice cannot be a substitute for good law.

The Court acknowledged that many women do not wish to turn to the law; they may make these choices due to structural constraints and personal wishes and that they should have the freedom of choice. The state should provide legal rights and make services available so that they can access them when they wish to make that choice. The Court held that a woman desiring to be counselled should not be propelled into litigation against her wish.

The Court took seriously the question that pre-litigation counselling may result in an amicable separation, but should it result in a negotiated settlement? Some women may not wish to pursue a legal case following such a settlement. The Court recognized that in such cases, future litigation would be an open option and a failed settlement would be important evidence in favour of the woman under Section 12 of the PWDVA. In view of the arguments that judicial arbitration in cases of domestic violence harms the interests of women, the Court held that having counsellors who may be sensitive to issues of power inequality during counselling would not enforce a settlement in favour of women—a violation of her legal and human rights.

The Court accepted that the practice in the Indian context is a hybrid, and a combination of counselling, mediation, and arbitration is used under various



Acts governing marital and other disputes in India. In this context, it is difficult to argue that the provision of counselling and mediation envisaged under the PWDVA is against the spirit of the law.

It was also argued by women's groups and activists that the reporting of domestic violence has increased due to this provision and that counsellors are the first port of call; they provide crucial emotional support, use risk assessment and management strategies, and provide a safe, neutral, non-judgmental space for women to negotiate a non-violent outcome. The service providers pointed out that a range of remedial options are open to women when they approach these counsellors with their problems, not all are urgent (some women want maintenance while others may want the right to residence) and pre-litigation counselling can address these needs.

The Court recognized that domestic violence is an anathema and that no woman facing physical violence can be counselled to settle or reside with a husband by any counsellor or service provider; this would pose a risk to women's lives. The Court stated that counsellors and the police should be trained so that they do not reconcile partners in cases of physical violence; and in such cases, a domestic incident report (DIR) should be filed under Section 12 of the PWDVA. In such cases, any further intervention would be countenanced only after the protective court order is obtained. The Court took on board a suggestion by the Lawyers Collective that such an order might be obtained as soon as the woman consents to counselling; this would constitute a record of domestic violence, and pre-litigation counselling would be the answer when a woman needs maintenance or a separate residence. All such counselling should take place within the required ethical framework, upholding the spirit of the legislation.

The Court quashed the circular of the Maharashtra state, as it was found to be discriminatory, arbitrary, and unusual. The judgment walks a fine line between the two feminist positions. The judge held that any woman who has faced violence as defined under the PWDVA, can access counselling and other services provided under the Act. However, the Court also specified that care should be taken to ensure that the woman is informed about her options, that joint counselling with the husband or other parties should commence after

obtaining her voluntary and informed consent, and that she should not be pressured during joint counselling. The Court ruled that pre-litigation mediation is allowed in other matrimonial disputes involving no violence, and guided that any settlement should be in writing, clearly stating “Terms of Settlement,” and that any service provider, at their discretion, may file a DIR under Section 10 of the PWDVA. However, it also specified that no joint counselling should be undertaken in case of serious physical domestic violence. The DIR under Section 10(2) of the Act should be automatically filed in all such cases.

### **VIII. DISCUSSION**

This section interweaves the two sections of this paper. We find that the judge has attempted to balance the two contrasting positions and ruled in the interests of women. However, the judgment raises certain key issues for feminist theory, practice, and legal interventions.

#### **Moving Away from the Ideology of Traditional Marriage**

Feminist commentators have commonly interpreted the state's apparent concern to protect women from domestic violence as motivated by a real concern to preserve the status of the traditional heterosexual, nuclear family.<sup>59</sup> However, the Bombay HC judgment does not fit into this trend. Justice Dalvi referred to the possibility that the social context views marital reconciliation and affective family ties as an important aspect of social harmony. She concluded, therefore, that women who face violence have to be treated with sensitivity. She also added that women who have been violated cannot be coerced into settlement or reconciliation with the husband or family members.

#### **Violence as a Continuum**

However, the Court makes an unhelpful distinction between physical and other forms of domestic violence. For instance, it stated that physical violence is an anathema to civilized society and that violence is dangerous, but the judgment fails to recognize that a woman's prolonged exposure to oppressive, malicious, vicious, callous conduct can lead to mental anguish and be a danger to the quality of life. For e.g., it can cause mental stress and result in loss of self and self-esteem. The judgement does not recognize that mental violence—through

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59 Srimati Basu, *THE TROUBLE WITH MARRIAGE: FEMINISTS CONFRONT LAW AND VIOLENCE IN INDIA* (2015).

confinement, bullying, coercion, and financial and emotional distress can be as detrimental to a woman's well-being as physical abuse and years of mental violence can lead someone to take her own life. Second, the Court made a distinction between episodic and routine forms of violence, and did not interconnect the two. As seen above, Stark's conceptualization of coercive control looked at how women are trapped within an abusive relationship—not because of individual acts of physical abuse, but because of the ways in which men entrap women through intimidation, isolation, and control, which is legitimized through law and society. Men use tactics such as limiting women's resources, isolating them, and undermining their privacy and autonomy. Stark suggests that violence in abusive relationships is ongoing rather than episodic, that its effects are cumulative rather than incident-specific and abused victims can be entrapped even when the assault is not present:<sup>60</sup>

Coercive control may be defined as an ongoing pattern of domination by which male abusive partners primarily interweave repeated physical and sexual violence with intimidation, sexual degradation, isolation and control. The primary outcome of coercive control is a condition of entrapment that can be hostage-like in the harms it inflicts on dignity, liberty, autonomy and personhood as well as to physical and psychological integrity.

The coercive control model certainly has resonances in the way that women experience domestic violence and abuse in the Indian context. The judgment could have gone further in recognizing this aspect of domestic violence.

Additionally, there are issues of post-separation violence that should be acknowledged. This remains a neglected area in the body of literature on domestic violence in India. Research in the United Kingdom and the United States has pointed to the increased risk of violence and abuse women face when they may decide to leave a violent and abusive partner. For instance, in the United States, 75% of the three American women murdered every day by an

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60 Stark, *supra* note 35, at 205.

intimate partner are killed within hours, days, or weeks after attempting to flee their abuser.<sup>61</sup>

Thiara and Gill's excellent study<sup>62</sup> on the experiences of black and minority ethnic women in the United Kingdom's experiences of post-separation abuse found that it was a significant issue for the majority of women studied, even in cases where separation had taken place years before. The research also found that for South Asian women, the joint family system, and pressures from extended families exacerbated these experiences. The South Asian family system often used other family members to pressure women into returning, or forcing contact with children. In most of these cases, children either witnessed post-separation violence, or were aware of the threat of such violence, and men used child contact or children in order to control, intimidate, and undermine women, and made it difficult for women to "move on."

In India, women continue to experience post-separation abuse from partners and extended marital families, and this may be complicated by the absence of natal support and welfare provision.<sup>63</sup> This void of support makes it harder for women to consider leaving the abusive partner, and may also contribute to women returning to violent partners and their families.

### **The Question of Agency**

The Bombay HC has also decided against feminist understandings that harmonize freedom and survival. For instance, while the Maharashtra government's circular refused to recognize the backdrop of feminist action that has shaped this law, the HC has not been adequately cognisant of feminist dilemmas of freedom and autonomy. Unlike feminist groups, the HC has decided to draw a line regulating the nature and extent of women's autonomy. The HC has made an assumption that women who face physical violence may

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61 *Post-Separation Abuse in Domestic Violence Cases: Out of the Frying Pan of Domestic Abuse and into the Fires of DV Homicide, Infanticide, and Child Sexual Abuse*, SPIRITUAL ALLIANCE TO STOP INTIMATE VIOLENCE (2014) available at <http://saiv.org/post-separation-abuse-in-domestic-violence-cases> (Last visited 20 April 2016).

62 Ravi Thiara and Aisha Gill, *Domestic Violence, Child Contact and Post-Separation Violence Issues for South Asian and African-Caribbean Women and Children: a Report of Findings* (The University of Warwick, NSPCC, and the University of Roehampton), available at <https://www.nspcc.org.uk/globalassets/documents/research-reports/domestic-violence-child-contact-post-separation-violence-report.pdf> (2012).

63 Solanki 2011, *supra* note 18; Solanki forthcoming, *supra* note 2.

not have the right to decide whether they wish to file an application in the HC or not, which has reinforced patriarchal paternalism by failing to believe that women are capable of making choices and respecting their choices. Furthermore, this case raises a very important concern that feminist politics when institutionalized through laws such as the PWDVA, may lose its meaning, particularly when these interventions depend on state governments and machinery for their implementation. The judgment is sensitive to this issue. However, the HC's decision to deny women agency will not provide a solution to this challenge of working with the state that feminists face. The judgment sidesteps this question by stipulating that women can be autonomous in making decisions about marital disputes, and women who face physical domestic violence should be under the paternalistic care of the state. The Maharashtra government seemed to suggest that women face the danger of loss of life in such conditions and, therefore, the state's decision is justifiable. This position raises two issues. First, data supporting either side of the debate is lacking—no studies in the Indian context examines whether women who are murdered due to domestic violence in the past were reconciled by state agencies or not. Second, such cases may not help women who might be compelled to commit suicide as a result of mental torture. This paternalistic approach of the judiciary, therefore, may not help women.

The judgment does not correspond to women's experiences and the structural constraints that they endure. The following vignette based on fieldwork conducted in Mumbai in December 2015 illustrates this point.<sup>64</sup> A Hindu woman approached the Bharatiya Muslim Mahila Andolan ("BMMA") with her three children. She had been beaten by her husband; she lived in a nearby slum where the BMMA office is located. She ran into the office; her face was swollen and she had a cut on her forehead after an incident of domestic violence that morning. While narrating what had happened that morning, she also told the group that she faced sexual violence and she feared that her husband might be abusing her younger children, a boy and a girl, behind her back. They lived in a rental room near her elder brother-in-law and sister-in-law's room in the slum. Her husband did not work; she worked as a domestic worker and was forced to leave her children alone when she went out to work. The

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64 Interview with Maya (name changed), Domestic Violence Survivor, by Gopika Solanki, the BMMA Office, Mumbai (17 December 2015).

group asked her if she had ever complained to the police. She said that she had gone to file a non-cognizable offense but her husband would run away every time the police approached; the police would try to catch him but soon gave up. As a result, he had never been brought before the police. The BMMA activists, after providing her with medical aid, went to her room to speak to the husband; as usual, he ran away. A couple of hours later, Maya rang the BMMA office and said that he was back in their dwelling. The BMMA activists went to her house a second time, but the husband again ran away. The activists called their contacts in the slum and an hour later, the contacts told them where he was hiding. Five activists caught him and went to the police station. They had a joint meeting with the husband, his family, the wife, the police officer in charge, and the BMMA activists.

The BMMA activists asked the woman what she wanted to do. The police officer in charge informed her of her rights, said that he was willing to file a criminal case, and would refer her case so that she could also file under the PWDVA. In addition, he was willing to investigate and file a case under Protection of Children against Sexual Offenses Act, 2012 that criminalises sexual violence against children. While the police is often lax and patriarchal in their general response to domestic violence, the individual police officer herein was cooperative, perhaps because of the activists' presence and pressure. The activists and the police informed the woman and her husband about their rights and the consequences of filing a case. The husband's parents told the police that they would send the husband to the village and that they and his elder brother would take financial responsibility of the maintenance for the woman and children. However, they would not do so if she filed a civil or criminal case against her husband. Maya decided to try this solution; the BMMA activists asked her if she was sure, and pointed out that it was not the best decision. Maya said that she agreed with the BMMA activists that her husband might come back from the village, the violence may continue, and that the husband's family might renege on their promises. However, she said: "I am an orphan; this is my second marriage. If I don't take up this option, I'll be on the street with my children and every other man will prey on our vulnerability and abuse us."<sup>65</sup> The PWDVA could help her secure a room, but the economic support in this case would have to come from her parents-in-law and elder brother-in-law. Antagonizing her in-laws was not useful to Maya in the short run or in the long run. As Maya said,

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65 *Id.*

“My elder brother-in-law and sister-in-law help us in every way—I can leave my children with them when I go to work; they are our neighbours and support us, give us food and medicines in times of need—I have to feed and educate these children—how do we survive without them?”<sup>66</sup> In Maya’s case, the threat of police action and the intervention of the BMMA gave her some temporary relief, and the case will continue at the BMMA and in other forums. Indeed, the BMMA activists deliberated with Maya and her elder sister-in-law what her options might be; in the coming years, perhaps they could ask her parents-in-law for a share in their property in Maya’s name or in the children’s name with Maya as a guardian. The idea of sending the children away to study in a residential school was also discussed; the safety and protection of very young children in the face of few options remain an ongoing concern for feminists and other activists. This case demonstrates the harsh realities of women’s lives, where choices are between various sub-optimal options and no guarantees of lives free of violence. The feminist challenges and efforts have been to expand the possibilities under these conditions. Therefore, although the judgment is sympathetic to women in its recognition of the dangers women face in cases of domestic violence, its paternalism denies women autonomy in ways that would harm women. As this illustration shows, in many instances (including in such cases of poverty, violence, and deprivation), this judgment is not enabling for women.

### Access to Counselling

The judgment, however, retains the distinction between pre-litigation and during-litigation counselling for women who have faced severe physical violence. In the context of family mediation, feminist scholars have pointed out that far from empowering women, the family mediation process acts against women’s interests; such mediation diminishes the importance of context, downplays the importance of rights, undermines the ability to hold a party accountable for his actions, and focuses on formal, rather than substantive, equality.<sup>67</sup> Conversely, others have pointed out that such arguments ignore the continuation of power imbalances during litigation, and tend to assume that the systems work, that court orders are followed, that there are no delays in the court

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66 *Id.*

67 Basu, *supra* note 59; Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100(6) THE YALE LAW JOURNAL, 1545 (1991).



process—these also underestimate the husband's capacity to pay back. Medsen cautions against taking an “all or nothing” approach when faced with domestic violence—not all types of violence are the same and may impact victims differently; thus, these nuances need to be taken into account.<sup>68</sup>

Similarly, there is no substantive evidence in the Indian context that women do better in court than in pre-litigation counselling. In many cases, violence does not cease during litigation—in some, it increases. For instance, in cases of marital disputes, women litigants in Family Court in Mumbai complained of increased surveillance and intimidation from their husbands, reported husbands harassing them by throwing garbage in their houses, sending local goons to intimidate women or their family members and support networks, causing scenes at women's workplaces and harassing their fellow workers and employers, threatening them or tricking them into discontinuing the cases.<sup>69</sup> Thus, the asymmetry of power and gender intertwined with class and other axes of identity become part of pre-litigation counselling as well as counselling under the supervision of the court. Second, as the court agreed, the violation of pre-litigation counselling terms can provide additional evidence to prove domestic violence and serve as evidence in order to secure maintenance to the wife. In addition, the Maharashtra state establishes a line between counsellors who, in their opinion, pressure women into reconciliation despite violence, but the State does not recognize how lawyers and judges may do so as well. Lawyers hold mixed views regarding any counselling, even during the court process. Some see it as a way to extend a dispute; others see it as a relief when they are unprepared; some see it as a legal strategy; others find it useful when they recognize that the opposite party may drop the case out of fatigue. In many cases, lawyers informally counsel their clients to reconcile, proudly declaring that “we are not home-breakers— we advise clients to reconcile even when it goes against our interests.”<sup>70</sup> In general, many women litigants have reported that they do not trust their lawyers, and find them expensive and unreliable. Some have also reported sexual harassment from lawyers and talked of lawyers violating legal

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68 Mary Adkins, *Moving Out of the 1990s: An Argument for Updating Protocol on Divorce Mediation in Domestic Abuse Cases*, 22(1) YALE JOURNAL OF LAW AND FEMINISM 97 (2010); Lene Madsen, *A Fine Balance: Domestic Violence, Screening, and Family Mediation*, 30(3) CANADIAN FAMILY LAW QUARTERLY, 345–365 (2014).

69 Solanki 2011, *supra* note 18.

70 Interview with lawyer S. Bhardwaj, by Gopika Solanki, Mumbai (23 December 2015).

aid norms.<sup>71</sup> The Maharashtra government's circular privileged the lawyers' role and reduced the social workers' role; it is unclear how this would help women litigants. It is equally unclear how women litigants who face violence would benefit from being helped by an initial contact with lawyers rather than with pre-litigation counsellors.

## IX. CONCLUSIONS

The 2015 judgment breaks new ground in that it does not reaffirm the preservation of marriage and social harmony as a key goal of counselling. It also demonstrates sensitivity to the challenges faced by women in domestic violence situations. It acknowledges the role played by the Indian women's movements in offering support to women. However, in case of serious physical violence, the court has adopted a paternalistic position, limiting the autonomy of women, and has reinforced the stereotype of women as patriarchal stooges.

We have argued elsewhere that feminist responses to violence against women are hybrid in nature.<sup>72</sup> Other than legal reform, some feminists provide legal aid and counselling to domestic violence victims (although this may be done in an indirect way through creative 'mis'-use of the law as a bargaining tool); others avoid engagement with the State through outreach and refuge provisions or women's councils to adjudicate on cases of gender-based violence. The Indian women's movement has always adopted multiple strategies, but it is also important to note that women experiencing domestic abuse and violence use multiple strategies, too; often concurrently, but sometimes in a more linear fashion. Women may use family courts, the police, women's organizations, and caste panchayats as different strategies to get justice or relief.<sup>73</sup> While the legal arena remains a significant avenue for many women—especially those who throng the courts in search of justice—other strategies may feed into and empower women further.

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71 Solanki 2011, *supra* note 18.

72 Gangoli and Rew, *supra* note 2.

73 Solanki 2011, *supra* note 18.